Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	

BELL ATLANTIC[1] COMMENTS

Introduction and Summary

This proceeding presents a once-in-a-lifetime opportunity to promote the future health and competitiveness of the Internet. The way to do so is by fulfilling Congress's directive to remove regulatory barriers to investment and the deployment of advanced services, in both the Internet backbone itself and the new on and off ramps needed to obtain high speed access to the Internet. Yet, the rules proposed here would do the opposite. They not only would preserve existing regulatory barriers to investment, but, in many respects, actually would increase them. The unintended consequence would be to deter, rather than promote, investment in the future of the Internet generally, and to deter broad-scale deployment of advanced services to provide high speed Internet access to the mass market in particular.

But it's not too late. By modifying its proposals here to adopt a positive agenda that reduces, rather than increases, the regulatory burdens it imposes on the Internet and services

[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc., New York Telephone Company and New England Telephone and Telegraph Company.

to access the Internet, the Commission can still speed the deployment of advanced services to all Americans and help to promote the health and competitiveness of the Internet.

First, the Commission should promote competition in the concentrated markets for Internet backbone services -- dominated by MCI Worldcom, Sprint and the spun-off MCI backbone – and for high speed connections to the Internet backbone. It can do so here by adopting targeted LATA boundary modifications to permit Bell companies to provide high speed transmission services for Internet backbones, to provide high speed connections to the nearest network access point, and to provide Intranets and Extranets to business customers – relief that will not undermine the Act's provisions governing traditional long distance services. Also, the Commission should confirm that the Act permits the Bell companies to provide advanced services that qualify as information services using long distance lines that are leased from a third party. And, to address future needs, it should establish a process for Bell companies to request other case-specific relief in unique circumstances where they can demonstrate that it will promote the public interest.

Second, the Commission should remove regulatory barriers that deter broad scale deployment to the mass market of xDSL and other advanced services for high speed access to the Internet that will compete with the cable incumbents. In particular, it should invoke its authority under section 251 to make clear that, when these mass market services are offered by the local telephone company, the equipment used to provide these advanced services, as opposed to the local loops over which they are delivered, is not subject to section 251(c)'s unbundling obligation and the advanced services themselves are not subject to that section's resale requirements. Likewise, the Commission should promptly reconfirm that Internet-bound calls are interstate and interexchange in nature, and are not subject to the payment of reciprocal compensation -- payments that the Chairman of one new entrant recently described as a "boondoggle" that "slows down the deployment of a high-speed packet-based network."

In contrast, the current proposal merely would replace one set of regulatory barriers with another, in the form of costly and inefficient separate affiliate requirements, and should not be adopted. This proposal does nothing to promote the deployment of advanced services to the mass market. The Commission has consistently found that structural separation requirements have delayed the introduction of new services, imposed unnecessary costs on consumers and provided no greater protection than other types of safeguards. Imposing separate subsidiary requirements on advanced services would cause history to repeat itself.

Third, the Commission should not adopt proposals to impose still more collocation, unbundling and resale rules. The existing rules are already adequate to address the needs of competing carriers that wish to offer advanced services in competition with incumbent carriers. Making more rules will only unnecessarily interfere with the ability of the local telephone company to provide existing and advanced services alike, with no incremental benefit to competition.

I. INTERLATA RELIEF IS ESSENTIAL TO PROMOTE BROAD SCALE DEPLOYMENT OF ADVANCED SERVICES.

As Bell Atlantic explained in its previous filings, the Commission can best promote the deployment of advanced services in the most efficient and effective manner by granting the interLATA relief the Bell companies need to provide advanced services on an end-to-end basis. These would include any advanced services that operate at speeds higher than are available today through ISDN offerings and all other Internet-related services. The Bell companies are in the best position to deploy these services quickly and on a broad scale.

Nonetheless, to the extent the Commission decides to grant more targeted interLATA relief, it should focus on the specific forms of relief described below that will do most to promote the growth and competitiveness of the Internet.

A. The Commission Should Exercise Its Authority To Modify LATA Boundaries In Specific Situations.

The Commission's authority to modify LATA boundaries is undisputed. The Commission has already found that "Section 3(25)(B) of the Act provides that BOCs may modify LATA boundaries, if such modifications are approved by the Commission." *Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service at Various Locations*, 12 FCC Rcd. 10646, ¶ 9 (1997); Notice, ¶ 190. And the Commission has repeatedly exercised this authority to provide expanded local calling services between communities that lie on different sides of existing LATA boundaries. *Id.*

The Commission should again exercise this authority to make targeted LATA boundary changes for high-speed transmission services for Internet backbones, for high speed access to Internet network access points and for corporate Intranet and Extranet services. Modifying LATA boundaries for the purpose of operating these dedicated high capacity computer-to-computer links is more limited than LATA boundary relief the Commission has routinely granted for traditional telecommunications services.

In fact, modifying LATA boundaries for advanced services is consistent with precedent under the AT&T consent decree, or "MFJ." Prior to 1996, the district court approved numerous modifications of the LATA boundaries where the relief enabled the provision of new services like wireless and SS7 services over larger geographic areas.[2] That is exactly the type of relief the Commission contemplates here. As a result, there is nothing radical or new about the Commission's use of LATA boundary modification authority to provide targeted relief for advanced services.

Moreover, granting the targeted relief requested here will not undermine the core provisions of section 271, which Congress wrote with the traditional long distance market in mind. Indeed, because the targeted relief described here will not provide an entree into the general long distance market, the incentives to break into that market will remain intact. Consequently, because the Bell companies would still need the Commission's approval to enter the $80 billion general long distance market, this relief would not diminish in any material way their incentives to meet the Act's section 271 requirements.

1. <u>High Speed transmission services for Internet backbones</u>. The Internet backbone is much like the Washington beltway – it is frequently jammed with traffic and is getting worse

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[2] Modifications of LATA boundaries were granted under the MFJ for specified purposes, particularly to make possible the speedier development of new telecommunications services or increased competition. *E.g., United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. Apr. 28, 1995) (wireless services); *United States v. Western Elec. Co.*, 1986-1 Trade Cas. &67,148 (paging services); *United States v. Western Elec. Co.,* No. 82-0192 (D.D.C. Feb. 26, 1986) (paging services); *United States v. Western Elec. Co.*, 1987-1Trade Cas. (CCH) &67,452 (cellular services); *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. Feb. 18, 1993) (cellular services); *United States v. Western Elec. Co.,* No. 82-0192 (D.D.C. Sept. 20, 1994) (video and audio programming by satellite and other means); *United States v. Western Elec. Co.,* No. 82-0192 (D.D.C. Sept. 21, 1993) (cable service); *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. Oct. 24, 1994) (same); *see also United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. Nov. 14, 1988); *United States v. Western Elec. Co.,* No. 82-0192 (Feb. 15, 1991); *United States v. Western Elec. Co.,* No. 82-0192 (May 11, 1994); *United States v. Western Elec. Co.,* 604 F. Supp. 256, 261 (D.D.C. 1984).

as more people try to get on it.[3] Moreover, as this Commission and both domestic and international antitrust authorities have recognized, the Internet backbone market today is highly concentrated, and is dominated by the big-three backbone providers – MCI Worldcom, Sprint, and the spun-off MCI backbone.[4] The Commission can go a long way toward addressing these problems if it adopts here a LATA boundary modification to permit Bell companies to provide transmission services for Internet backbones without regard to geographic boundaries, and, by doing so, introduce a number of strong new suppliers to the Internet backbone market.

2. High speed access to the nearest network access point. High speed access to Internet backbones is not available everywhere, and many areas have been bypassed by the three carriers that dominate the Internet backbones.[5] Even where high speed access to the

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[3] *See, e.g., Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services,* White Paper Supporting Petition, CC Docket No. 98-11 (Filed Jan. 26, 1998); J. Dvorak, *Breaking Up the Internet Logjam*, PC Magazine, Apr. 8, 1997; Press Release, *DSL and Cable Modems Will Not Solve Internet Performance Problems, According to Keynote Systems; Internet Speed Limit Impedes Full Potential of High-Speed Internet Access Over 'The Last Mile,'* www.keynote.com/news/ announcements/pr021398.html.

[4] *See, e.g.,* Antitrust Division Press Release, *Justice Department Clears WorldCom/MCI Merger After MCI Agrees to Sell its Internet Business* (July 15, 1998) (Assistant U.S. Attorney General Joel Klein noted that "[t]he merger as originally proposed would have given WorldCom/MCI a significant proportion of the nation's Internet traffic, giving the company the ability to cut off or reduce the quality of Internet services that it provided to its rivals"); Keynote Systems and Boardwatch Magazine, Keynote/Boardwatch Internet Backbone Index, Nov. 11, 1997, http://www.keynote.com/measures/backbones/backbones.html.

[5] *See, e.g.,* Comments from The Rural Policy Research Institute, CC Docket 98-146 (Sept. 14, 1998); Comments of U S West Communications, Inc., CC Dkt. 98-146, pp. 15-18 (Sept. 14, 1998); Bell Atlantic 706 Petition, CC Docket 98-11 at 14 (Jan. 26, 1998); Bell Atlantic 706 Reply, CC Docket 98-11 at 10-13 (May 6, 1998).

backbones is available, moreover, there typically are a limited number of facilities providers to choose between.

In order to have competing high speed connections to Internet backbones available on a broad scale, the Commission should modify the LATA boundaries that currently preclude Bell companies from providing that access. Specifically, it should approve a LATA boundary modification to permit Bell companies to carry traffic to the nearest network access point, or "NAP," whether public or private.

The benefits of granting this relief will be especially pronounced in rural or other areas that existing providers have largely ignored. As WorldCom and others have noted, they do not find it economic to serve places like West Virginia (and no doubt many other areas) with their own facilities. *See* WorldCom West Virginia Comments, CC Docket No. 98-11 at 3 (Aug. 10, 1998). The benefits will not, however, be limited to those areas. Even in those areas where existing providers do operate, competition is limited and options are few. As a result, the Commission should not continue to restrict the local Bell companies from solving the bandwidth famine problems in reliance on claims by opponents that "competition" from companies that have little incentive to compete will solve all problems.

As with relief for the backbones themselves, this targeted relief would not diminish Bell company incentives to meet 271 requirements. The fact remains that Bell companies still will need long distance relief to enter the general long distance market and to serve their existing customer base with a full range of local and long distance voice and data services other than these limited Internet services. As a result, limited LATA boundary relief that enables a Bell company to provide a short high speed connection to the nearest public or private NAP will not in any way make section 271 relief less attractive or necessary.

3. Intranets and Extranets. The Commission also should permit Bell companies to provide advanced Intranet or Extranet services to businesses, universities or health care providers. These private corporate (and institutional) networks for advanced services are not even part of the public telephone network that Congress had in mind in enacting the 1996 Act. They can be accessed only by the corporation itself or external partners chosen by the corporation. They cannot be used to communicate with the public at large. To the extent Intranets and Extranets are even subject to LATA boundaries, there are sound reasons for modifying those boundaries.

Most importantly, granting relief would introduce strong new competitors into this market to bid against the existing providers, and provide the benefits that new competition brings to any markets – the potential for more competitive prices and more innovative service offerings. Moreover, because of the enormous potential for these private networks to improve the efficiency and productivity of their users, introducing added competition is especially beneficial because of the flow-through effect on the economy as a whole and on the critical education and health care sectors of the economy in particular.

Granting the Bell companies limited interLATA relief to provide Intranet/Extranet services would not diminish the need or desire for Bell companies to obtain section 271 relief. Bell Atlantic's share of the market for these advanced services (about $40 million in 1998) pales in comparison to the $80 billion market for general long distance services and are used by only a small portion of Bell company customers. Targeted relief for Intranets and

Extranets will not detract one iota from Bell Atlantic's need to be able to offer the full range of services – local, toll and long distance – for its tens of millions of customers so that it does not lose them to competitors that can and do offer all of these services.

The dividing line between private networks such as Intranets and Extranets and the vast bulk of interLATA services is well-defined and enforceable. Intranets and Extranets are defined by their strict limitation on who can access them – in the case of Intranets, only a corporation's employees, and in the case of Extranets, only the individuals chosen by the company.

4. Additional case-specific relief. Because the telecommunications universe is not a static one, the Commission should establish an expedited process for Bell companies to request case-specific relief in the future in response to unique circumstances.[6] Where the Bell company can show, on a case-specific basis, that relief is in the public interest because of unique circumstances, and that relief will not undermine the provisions of section 271, there is no reason for the Commission to maintain the restrictions.

B. The Commission Should Confirm That Incumbent Carriers May Provide Information Services On A National And International Basis And Do Not Need InterLATA Authority To Provide These Services.

In its Notice here (at ¶ 35), the Commission suggests that all "advanced services are telecommunications services," and, therefore, that all advanced services are subject to section

[6] Specifically, the process should be modeled on the Commission's current approach for handling LATA boundary modification requests, but subject to uniform deadlines for pleadings and a decision -- with comments and replies due on a 15 and 10 day cycle, and a decision within 60 days of filing.

251's unbundling and resale obligations and to section 271's restriction on the provision of in-region interLATA services. This is incorrect.

In reality, while some advanced services, such as xDSL transmission services, may qualify as telecommunications services under the Act, others that involve the generation or storage of information content or protocol conversions clearly do not. Rather, these latter services constitute information services under the express definitions in the Act and the Commission's own rules – which the Commission repeatedly has emphasized is a separate and distinct category from telecommunications services.

Moreover, because telecommunications and information services are separate categories, the Commission itself previously recognized that information services are not subject to the Act's unbundling or resale requirements.[7] By the same token, and as the Commission's recent *Report to Congress* on universal service issues makes clear, information services also are not subject to the Act's restrictions on providing in-region interLATA services so long as the Bell company obtains the transmission services that are used to provide the information services from a third party.

1. When A Bell Company Provides InterLATA Information Service Using Transmission Services Obtained From Others, It Is Not Providing InterLATA Services Under Section 271.

Section 271(a) states that a Bell company may not "provide interLATA services" originating in its region except as permitted under that section. The scope of this restriction is

[7] *Federal State Board on Universal Service. Report to Congress.* 13 FCC Rcd 11501, ¶ 69, n.138 (1998) ("*Report to Congress*"); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16170 (1996) ("*Local Competition Order*").

established by the express definition of "interLATA services," which means telecommunications between a point located in a local access and transport area and a point located outside such area." 47 U.S.C. § 153(21) (emphasis added). And under the express terms of the Act, "[t]he term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43) (emphasis added). In contrast, the Act defines information services as the mutually exclusive set of services that do involve a change in the form or content: "[t]he term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing." 47 U.S.C. § 153(20).

Based upon that express language of the Act, as well as the supporting legislative history,[8] the Commission has correctly concluded that telecommunications and information services are distinct, non-overlapping sets. In fact, as the Commission recently reiterated in its *Report to Congress*, it has conclusively established that a provider of information services is not "providing telecommunications" when it acquires the necessarily-included transmission service from a third party and bundles it into an information service offered at a single price:[9]

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[8] *See Report to Congress* ¶ 44, n.94 (Apr. 10, 1998) ("we have no reason to question that various statements in [the Senate] Report apply to the 1996 Act, as adopted by Congress: that the telecommunications definition 'excludes . . . information services'; that information service providers 'do not "provide" telecommunications services' . . . ."), *see also id*. at ¶ 69 n.138 ("[T]he 1996 Act built on the Commission's deregulatory actions in *Computer II*, so that 'telecommunications' and 'information service' are mutually exclusive categories").

[9] "Necessarily included" because, by definition, an "information service" is provided "via telecommunications." 47 U.S.C. § 153(20).

After careful consideration of the statutory language and its legislative history, we affirm our prior findings that the categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive. Under this interpretation, an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers 'telecommunications.' By contrast, when an entity offers transmission incorporating the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,' it does not offer telecommunications. Rather, it offers an 'information service' even though it uses telecommunications to do so. *Universal Service Report to Congress* & 39 (footnote omitted).[10]

As the Commission has explained, under these circumstances, an information service provider is <u>using</u> telecommunications, not <u>providing</u> it. It is the company engaged in the provision of transmission capacity <u>to</u> information service providers that is providing telecommunications:

> [A]n entity should be deemed to provide telecommunications . . . only when the entity provides a transparent transmission path, and does not "change . . . the form and content" of the information. When an entity offers subscribers the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or

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[10] *See also Report to Congress* at ¶ 40 ("the language Congress used to define 'telecommunications' . . . specifies that the transmission be 'without change in the form or content of the information as sent and received.' It appears that the purpose of these words is to ensure that an entity is <u>not</u> deemed to be providing 'telecommunications,' notwithstanding its transmission of user information, in cases in which the entity is altering the form or content of that information."); *id.* at ¶ 33 ("the Commission ruled in the *Universal Service Order* that entities providing enhanced or information services are not thereby providing 'telecommunications service.'"); *id.* at ¶ 33 n. 51 ("[t]he Commission in the *Non-Accounting Safeguards Order* treated the category of information services as distinct from telecommunications").

> making available information via telecommunications," it does not provide telecommunications; it is using telecommunications.

Id. at ¶ 41 (footnotes omitted) (emphasis added).[11]

It is, in short, now unmistakably clear that when a Bell company provides an information service, it is not "providing telecommunications," at least so long as it uses leased transmission facilities that are bundled into its information service for a single price.[12] Under the express definition of "interLATA services," then, such a provider of an information service is not providing an "interLATA service" covered by Section 271.[13]

Moreover, while the express statutory definitions are dispositive, the Act's carefully drawn distinction between telecommunications and information services is further reinforced by Section 272, which lays out the circumstances in which various Bell company services must be provided through a separate affiliate. In fact, Section 272 consistently affords separate

[11] *See Report to Congress* at ¶ 43 ("The Senate Report stated in unambiguous terms that its definition of telecommunications 'excludes those services . . . that are defined as information services.' Information service providers, the Report explained, "do not 'provide' telecommunications services; they are users of telecommunications services.") (quoting *Senate Report* [S. Rep. No. 23. 104th Cong., 1st Sess. (1995)] at 18, 28) (footnotes omitted) (emphasis added).

[12] The Commission reserved for further proceedings the different situation "where an Internet service provider owns transmission facilities, and engages in data transport over those facilities in order to provide an information service." *Id*. at ¶ 69. "One could argue that in such a case the Internet service provider is furnishing raw transmission capacity to itself." *Id*. (footnote 138 attached, stating: "When the information service provider owns the underlying facilities, it appears that it should itself be treated as providing the underlying telecommunications.").

[13] The situation that the Commission distinguished and reserved was limited to an information service provider that "owns" its transmission facilities. *Id*. at ¶ 69. The general Commission ruling that an information service provider does not provide telecommunications was phrased repeatedly to cover "leased lines," without further narrowing based on forms of payment. *Id*. at ¶ 67.

treatment to "information services" and to "telecommunications services" – both in the provisions that impose a separate affiliate requirement (*see* § 272(a)(2)(B) & (C)), and in the provision that establishes different sunset requirements for those services (*see* § 272(f)(1) & (2)). And it is only the separate provisions that address "telecommunications services" that make any mention of Section 271, or that tie the sunset to the date on which a Bell company is "authorized to provide interLATA telecommunications services under Section 271(d)." *See* § 272(a)(2)(C) & (f)(1). In contrast, the sunset date for interLATA information services is keyed to passage of the Act, *see* § 272(f)(2), further confirming that Congress anticipated that these services, unlike interLATA telecommunications, could be provided beginning immediately upon enactment.

2. The Commission's *Non-Accounting Safeguards Order* Does Not Require A Different Result.

In its *Non-Accounting Safeguards Order*, the Commission concluded that at least some types of "interLATA information services" fall within the definition of "interLATA services." *Implementation of the Non-Accounting Safeguards of Sections 271 and 272*. 11 FCC Rcd 21905 at ¶56 (1996) ("*Non-Accounting Safeguards Order*"). As the Commission since made clear, this conclusion does not apply where transmission services are obtained from third parties for use in providing the information service. Under these circumstances, nothing in the *Non-Accounting Safeguards Order* requires a different result.

First, the Commission said: "interLATA information services are provided via interLATA telecommunications transmissions and, accordingly, fall within the definition of 'interLATA service.'" *Id*. But as the Commission has now thoroughly explained, the "accordingly" does not follow at all where the transmission services are obtained from others. Under these circumstances, the fact that information services are provided "via telecommunications" means that providers of such services <u>use</u> telecommunications. It does not mean that they <u>provide</u> telecommunications – as expressly required by the statutory definition of "interLATA services."

Second, the Commission said: "we believe that it is a more natural, common-sense reading of 'interLATA services' to interpret it to include both telecommunications services and information services." *Non-Accounting Safeguards Order* at ¶ 56. But it is well settled that a supposedly "natural, common-sense" meaning does not control when statutory terms are given express statutory definition establishing precisely what they mean.[14] And here, the

[14] As the Commission itself has recognized, the express statutory definition are controlling in interpreting the scope of the Act's provisions. *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, FCC 98-188, ¶ 33 (rel. Aug. 7, 1998) (footnote 49 citing 47 U.S.C. § 153) ("[t]he specific obligations of the 1996 Act depend on application of the statutory categories established in the Act's definitions section."); *Universal Service Report to Congress* ¶ 21 ("All of the specific mandates of the 1996 Act depend on application of the statutory categories established in the definitions section."). And the law is settled that such definitions – when they are phrased, as these are, to state what a term "means" rather than what it "includes" – control even over what might otherwise be a "natural" or "ordinary" meaning. *See, e.g., Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995); *FDIC v. Meyer*, 510 U.S. 471 (1994); *Smith v. United States*, 508 U.S. 223 (1993); *Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979) (quoting C. Sands, *Statutes and Statutory Construction* § 47.07 (4th ed. Supp.1982)); *American Mining Congress v. EPA*, 824 F.2d 1177, 1189 (D.C.Cir. 1987); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir.1982).

express statutory terms make clear that the term "interLATA services" does not include information services that use transmission services leased from others.

Third, the Commission found support in the fact that Section 272(a)(2) uses the language "interLATA telecommunications services" and contrasts it with "interLATA information services." The inference the Commission draws from this fact is backwards. In reality, section 272(a)(2) naturally supports the distinctness of information services and telecommunications. And the most natural inference from the provision's use of "interLATA telecommunications services," rather than "interLATA services," is that it was chosen to highlight the contrast with "interLATA information services." And this understanding accords with various aspects of Section 272 that strongly confirm – as the Act's express definitions provide – that Section 271 covers only telecommunications, not information services.

Fourth, one additional argument that was made in the *Non-Accounting Safeguards Proceeding* -- but that the Commission did not adopt -- was that section 271(g)'s list of incidental interLATA services that the Bell companies may provide somehow shows that Congress intended for information services to be within the scope of interLATA services. This is so, the argument goes, because some of the incidental interLATA services permitted by that section qualify as information services and would not have been included if the Bell companies already could provide information services across LATA boundaries.

This argument makes nonsense of the express limitations imposed by the definition of interLATA services, and it is axiomatic that the after-included provisions of section 271(g) must, if possible, be construed to be in harmony, rather than in conflict, with the express definitional terms. Here, that harmonious interpretation is readily apparent. As an initial matter, many of the incidental services covered by Section 271(g) – unlike information services – properly can be classified as telecommunications services.[15] But even aside from those 271(g) items that can be wholly telecommunications, the circumstance contemplated in

[15] The Commission itself has recognized that "[f]or the most part, the incidental interLATA services . . . are telecommunications services." *Non-Accounting Safeguards Order* ¶ 94 (footnote omitted). For example, network signaling (items (5), (6)) is expressly excluded from the definition of "information services" (47 U.S.C. § 153(20)). Similarly, wireless services (item (3)) are undoubtedly telecommunications. *See Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 780 (1997) ("*Universal Service Order*").

Section 271(g) is the provision of truly "*incidental*" telecommunications: when the transmission component of a non-telecommunications service, including an information service (which are by definition offered "via telecommunications"), is treated as a separate service.[16] In that situation, when the Bell company uses its own facilities for the transmission, whether that offering is the self-provision of a separate transmission service, *i.e.*, telecommunications – is precisely the issue that the Commission left open in its *Report to Congress*. And as the legislative history confirms, it is precisely the circumstance where a Bell company is providing telecommunications that is *incidental* to one of the itemized services where section 271(g) applies.[17] In contrast, it does not apply, because it is not needed, when a Bell company leases transmission from a third party as an input for use in providing an information service.

[16] At least since *Computer II*, 77 FCC 2d 384, ¶229 (1980), the Bell operating companies have been required to treat their own facilities-based transmission as distinct from the enhanced services into which it is an input, and to make the transmission available separately to other enhanced service providers on non-discriminatory terms. *See Frame Relay Order*, 10 FCC Rcd 13717, ¶¶ 13, 41 (1995) ("carriers that own common carrier transmission facilities and provide enhanced services must unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions").

[17] As the Conference Report explains, "section 271(b)(1) requires a BOC to obtain Commission authorization prior to offering interLATA services within its region unless those services are . . . 'incidental' to the provision of another service, as defined in new section 271(g), in which case, the interLATA service may be offered after the date of enactment." H.R. 458, 104th Cong. 2d Sess., at 147 (emphasis added).

II. THE COMMISSION SHOULD REMOVE REGULATORY BARRIERS TO BROAD SCALE DEPLOYMENT OF ADVANCED SERVICES TO THE MASS MARKET BY LOCAL TELEPHONE COMPANIES.

In order to promote the broad scale deployment to the mass market of the xDSL and other advanced services that can provide high speed access to the Internet in competition with the cable incumbents, the Commission should remove existing regulatory barriers to investment and deployment of these advanced service by local telephone companies. In particular, the Commission should invoke its authority under section 251 of the Act to make clear that when advanced mass market services are offered by the local telephone company, the unbundling and resale obligations in section 251(c) do not apply. It also should make clear that Internet-bound calls delivered over these advanced services are not subject to the payment of reciprocal compensation.

In contrast, imposing a separate affiliate requirement as the price to avoid existing requirements will only substitute one set of regulatory barriers for another. This will do nothing to promote the deployment of advanced services, but instead will impose unnecessary costs and inefficiencies that will delay broad scale deployment and increase costs to consumers.

A. The Commission Should Remove Unbundling And Resale Obligations That Deter Broad Scale Deployment In An Efficient Manner Through The Local Telephone Company.

As is addressed further below, by far the most efficient way for incumbent carriers to deploy advanced services – particularly to the mass market – is through the operating local telephone companies. This allows the telephone companies to draw upon their existing work forces, expertise, and operating and billing systems to deploy and operate these advanced services, and to avoid the significant duplication of costs that would be incurred if the services were to be deployed through a separate entity. Significantly, the competitors of the telephone companies, including both the cable incumbents and other providers, already are free to offer these services on an efficient, integrated basis.

As the Commission itself has recognized, however, the unbundling and resale obligations imposed on the traditional telecommunications services significantly undermine the incentives of incumbent carriers to make the enormous investments necessary to broadly deploy advanced services, especially to the mass market. They do so by forcing incumbent carriers to make their investments in advanced service capabilities available to competitors at cost and by allowing competitors to enter the market by piggybacking on the investment made by the incumbent with no risk to themselves. The result is to largely deprive the incumbent carriers of the benefits of undertaking the inherently risky investment to deploy these facilities, and to thereby undermine their incentives to make the investment necessary for broad scale deployment in the first place.

To remove this deterrent, the Commission should invoke its express authority under Section 251 to make clear that the unbundling and resale obligations do not apply to these advanced services when they are offered through the local telephone company. For example, under Section 251(d)(2), equipment and facilities used to provide advanced services do not need to be unbundled where failure to provide a competitor with access to those elements will not "impair" its ability to provide services (or where access to proprietary elements is not "necessary"). But the equipment at issue here is in no sense an embedded "bottleneck" facility that competitors need access to. On the contrary, it is equipment that is being deployed now for the first time, and that competitors themselves can obtain from the same sources as the incumbent and deploy on the same basis. Indeed, the Commission itself has implicitly recognized as much, since it has concluded that competitors do not need access to this equipment when it is deployed in a separate affiliate.

Likewise, Section 251(c)(4) creates a duty only to not impose "unreasonable" conditions or limitations on the resale of telecommunications services, and assigns the Commission a role in determining what is and is not reasonable. But this duty must be balanced against the Congressional directive to promote deployment of advanced services. And given this mandate, it is certainly "reasonable" to restrict the availability of these services to competitors at a wholesale discount -- precisely because subjecting these services to that obligation would interfere with the fulfillment of another express Congressional directive.

Finally, the Commission should make clear, once and for all, that Internet-bound calls delivered over these advanced services are not subject to the payment of so-called "reciprocal compensation." As one analyst has explained, payment of reciprocal compensation on this traffic actually deters investment in competing facilities because it has the "perverse effect of turning customers from assets to liabilities." *See* S. Cleland, "Reciprocal Comp For Internet Traffic—Gravy train Running Out of Track," Legg Mason Research Technology Team (June 24, 1998). Moreover, as the Chairman of Covad, a competing provider of advanced services recently explained, the effect of the reciprocal compensation "boondogle" is to "slow down the deployment of a high-speed packet-based network." *See* Transcript, Economic Stategy Institute Forum on Section 706 (Sept. 16, 1998); Comm. Daily, Sept. 17, 1998 at 4. This is yet another reason why the Commission needs to resolve this issue quickly and reaffirm that Internet traffic isn't eligible for reciprocal compensation.

B. In Contrast, Adopting A Separate Subsidiary Proposal Will Increase Costs and Delay Wide Scale Deployment To The Mass Market.

As history conclusively shows, imposing a separate affiliate structure as the price to deploy new services free of existing regulatory constraints merely substitutes a whole new set of regulatory barriers that will increase costs and delay deployment to the mass market. Nothing has changed to make separate subsidiaries any more economically rational for regulating the emerging advanced services of today. To the contrary, the experience of enhanced services counsels that consumer welfare is enhanced by integrated telephone company provision of new services.

First, separate subsidiary requirements are economically inefficient. The Commission itself has noted in other contexts that structure separation requirements "can . . . decrease efficiency . . ." *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations*, 98 F.C.C.2d 1191, 1198 (1984). Eminent economist Robert Crandall has written that separate subsidiary "requirements discourage the most efficient use of facilities, resulting in higher costs and, therefore, higher prices." Affidavit of Robert W. Crandall, Comments of Bell Atlantic, CC Docket 96-21, at 9 (March 13, 1996) ("Crandall Affidavit"). These requirements can increase service costs up to 30%. Affidavit of Robert W. Crandall, Bell Atlantic Reply Comments, CC Docket No. 96-61 at ¶7 (May 3, 1996) (citing 1995 study by Professors Hausman and Tardiff).

The Commission's experience with separate subsidiaries for voice messaging services shows the costs to be staggering. Dr. Jerry A. Hausman has calculated that the requirement delayed the introduction of network-based voice messaging services by five to seven years and caused a public welfare loss of $1.27 billion. Bell Atlantic Comments, CC Docket No. 95-20, Attachment A (filed April 7, 1995). In addition, Bell Atlantic demonstrated that imposing a separate subsidiary requirement on its voice messaging service would cost at least $100 million. Bell Atlantic Comments, CC Docket No. 95-20 and 98-10 at 8 (filed March 27, 1998). Similarly, US West estimated the cost of structural separation for voice mail to be between $59 million and $91 million. US West Comments, CC Docket Nos. 95-20 and 98-10, attached economic study at 3 (April 4, 1998).

Second, and more importantly, separate subsidiary obligations are actually anticompetitive and hurt consumers by artificially imposing unnecessary costs on one of the competitors. Unlike competing carriers that offer all traditional telephone services and advanced services on an integrated basis through a single company, incumbent carriers would have to operate two separate companies to accomplish the same result. A competing carrier can use the same technician, the same ordering and billing systems, and the same facilities to provide its both its traditional and advanced services. Bell Atlantic, on the other hand, would have to have two of everything, at a prohibitive cost penalty.

Third, a separate affiliate requirement not only imposes additional costs, but it also delays deployment of advanced services to the mass market – depriving consumers of the advanced services they want. A separate affiliate would have to start from scratch, hiring its own construction force, marketing organization, billing systems and the like. All of this takes time, especially for any broad scale deployment of advanced services. Voice messaging services are a prime example. It was only after the Commission lifted its structural separation requirements that these services became available to the mass market. Crandall Affidavit at 8.

Fourth, the Commission has found that non-structural safeguards are effective in any event. Actual market experience proves the point. Since divestiture, Bell companies have been permitted to offer a variety of services and products that interconnect with the local network – ranging from enhanced services and customer premises equipment to corridor interLATA services – through the telephone companies rather than separate subsidiaries. In every case, the result has been an increase in overall output and lower prices, with no harm to competition. In fact, the enhanced (information) services and CPE markets are highly competitive.

<u>Corridor InterLATA Service.</u> Bell Atlantic routinely has provided interLATA services in the northern New Jersey-New York and southern New Jersey-Philadelphia corridors for over ten years without structurally separating its retail and wholesale operations and without anticompetitive consequences. *See United States v. Western Elec. Co.*, 569 F. Supp. 990, 1018-19, 1023 (D.D.C. 1983). According to AT&T's own estimate, Bell Atlantic's prices are up to one-third lower than those of the Big Three interexchange carriers. AT&T Corp.'s Petition for Waiver and Request for Expedited Consideration, *AT&T Petition for Waiver of Section 64.1701 of the Commission's Rules*, CCB/CPD Docket No. 96-26 Attachment A (Oct. 23, 1996) ("AT&T Waiver Petition"). Yet, after twelve years, Bell Atlantic has not dominated the market — it has less than 20 percent of the corridor market. *See* Declaration of Robert W. Crandall, ¶ 10, attached to Bell Atlantic Petition ("Petition"), DA 95-1666 (filed July 7, 1995); *see also*, Declaration of Robin A. Lewis-Ivy attached to Petition. When

AT&T asked for permission to lower its own rates in the corridors, AT&T did not allege that Bell Atlantic has been leveraging its "bottleneck" over carrier access; rather, it complained that Bell Atlantic was undercutting AT&T's prices and that AT&T needed the ability to deaverage its rates to respond to the additional competition. AT&T Waiver Petition at 4-5. Similarly, other large incumbent local exchange carriers such as Rochester Telephone (now Frontier) have offered interLATA services for years without apparent anticompetitive effect.

Information Services. Bell Atlantic and other incumbent local exchange carriers have long been allowed to provide information services without structurally separating their retail and wholesale operations, and the evidence shows that competition in these markets has been enhanced. If the Bell Operating Companies were able to inhibit competition in these markets, output would have dropped and prices would have risen. But, in fact, just the opposite has occurred. Since incumbent local exchange carriers began offering voice messaging services, the market has grown in size and prices have fallen. From 1990 to 1995, the incumbent local exchange carriers' participation in this market increased from zero to over six million subscribers, but their subscriber base collectively accounts for just over 15 percent of voice messaging service revenues nationally. *See* Comments of Bell Atlantic, CC Docket No. 95-20 at 8-9 (filed April 7, 1995); *see also* Jerry A. Hausman and Timothy Tardiff, *Benefits and Costs of Vertical Integration of Basic and Enhanced Telecommunications Services*, at 5 (April 6, 1995), attached to Comments of Bell Atlantic. At the same time, the monthly retail charge for voice messaging service dropped from $30 in 1990 to $5-$15 in 1995. *Id*.

Customer Premises Equipment. Since 1984, the Bell Operating Companies have been permitted to distribute customer premises equipment ("CPE") without separating their retail and wholesale operations but have not impeded competition. In the intervening 14 years, output has steadily grown and prices have fallen, and the Bell companies are dwarfed by major vendors such as Lucent, Nortel, and Siemens. *See* MMTA, 1998 MultiMedia Telecommunications Market Review and Forecast, 85-87 (detailing demand growth and price decreases for CPE markets); *id*. at 96, 102-104, 108 (listing leading suppliers in CPE submarkets). In fact, the U.S. Court of Appeals observed that the customer premises equipment market "has supported competition even though the BOCs" theoretically "possess[] an incentive to discriminate in interconnection." *U.S. v. Western Electric Co.*, 900 F.2d 283, 303 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 911 (1990).

The Commission's separate subsidiary focus, then, is misguided. It imposes significant costs that ultimately must be borne by consumers, yet will not produce any discernible benefit. If the Commission expects its separate subsidiary proposal to reduce the number of complaints filed by competitors, it is mistaken. Competitors will still have incentives to game the regulatory process no matter how equally they are treated. If the Commission expects separate affiliates will provide some gauge to resolve those complaints, again it is mistaken. As proposed, there is absolutely no incentive to even use separate affiliates – especially for mass market deployment. And the kinds of performance reports that Bell Atlantic produces for the Commission and the states already provide a basis to monitor and evaluate complaints.

C. The Separate Subsidiary Requirements Proposed By The Commission Are <u>Particularly Problematic</u>.

Even aside from the general problem with any form of structural separation requirements, the Commission's proposal here is particularly problematic. Moreover, the key concern that underlies the proposal – that the separate affiliate not qualify as a "successor or assign" of the local exchange carrier – does not require the burdensome and costly structural separation requirements proposed here.

As a general matter, the courts have found that an entity becomes a successor or assign of another only upon "a completed transfer of the entire interest of the assignor in the particular subject of assignment, whereby the assignor is divested of all control over the thing assigned." *Miller v. Wells Fargo Bank Int'l Corp.*, 540 F.2d 548, 558 (2d Cir. 1976). The assignor must "cease its ordinary business operations" and the assignee must "continu[e] ... the enterprise of the seller corporation." *Neagos and Neagos v. Valmet-Appleton,* 791 F.Supp. 682, 689 (E.D. Mich. 1992).

Contrary to the Commission's assumption, however, simply transferring customer lists, giving customers the option of switching to a new provider, or agreeing to fill unfilled orders is not sufficient to make the assignee a successor or assign. *See Neagos*, 791 F. Supp. at 692. Nor does "a corporation which merely purchases the assets of another corporation, without more," become a successor or assign. *Unifirst Corp. v. Ford*, 1993 Ohio App. LEXIS 143, *9 (1993). *See, also, Safer v. Perper*, 569 F.2d 87, 95 (D.C. Cir. 1977), citing *Wawak Co. v. Kaiser,* 90 F.2d 694, 697 (7th Cir. 1937) (A successor "takes the place that another has left, and sustains the like part or character."); Black's Law Dictionary (5 Ed. Rev. 1979) 1228 (a successor is generally "another corporation which, through amalgamation, consolidation, or other legal succession, becomes invested with rights and assumes burdens of [the] first corporation").[18]

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[18] Nor can an affiliate become a successor or assign of a Bell operating company "merely because it is engaged in local exchange activities." *Non-Accounting Safeguards Order* at ¶ 312. Instead, the Commission will consider an affiliate to be a success or assign

1. There is no reason to restrict the transfer of equipment from an incumbent carrier to an affiliated separate subsidiary.

The Commission is correct in concluding that incumbent carriers must be able to transfer advanced services equipment to their affiliate. This should include all equipment except that used solely to provide non-advanced services. There is no need for incumbent carriers to first offer this equipment to third parties. Competing carriers can buy advanced services equipment from the same vendors used by the incumbent carrier. Such a requirement would only serve as a means for competing carriers to meddle in equipment transfers as a way to delay the affiliate's roll-out of advanced services. Existing affiliate transaction rules and accounting safeguards will ensure that the incumbent carrier does not subsidize the advanced services affiliate by transferring equipment below cost.

There is also no reason for the Commission to impose a time limitation on transfers of equipment. It is unrealistic to believe that the change in an incumbent carrier's corporate structure contemplated and the deployment of new services in an affiliate as in the Commission's proposed rules could be accomplished in six months, or even a year. For example, Bell Atlantic estimates that deployment of DSL in a separate affiliate would delay its deployment by at least one year and reduce the number of homes passed by 30 percent or more. *See* Wegleitner Decl. at ¶ 4. And to the extent the Commission's rules make it infeasible to roll out advanced services to the mass market through a separate subsidiary, all

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only where it "transfers network elements to the affiliate." *Id*. at ¶ 311. Here, however, the Bell company would continue to provide its existing local telecommunications services, including local loops as unbundled network elements. And, for the reasons outlined above, the Commission should make clear that the equipment deployed to offer advanced services over these loops do not qualify as network elements that must be unbundled under the standards of Section 251(d)(2).

that a time limitation on transfers would do is ensure that they would never move to such a structure.

2. There is no reason to restrict the transfer of information from an incumbent carrier to an affiliated separate subsidiary.

The separate subsidiary requirements proposed by the Commission could, at the extreme, be construed to bar any information exchange between the incumbent carrier and the affiliate unless this information was made publicly available. This restriction would effectively foreclose any possibility of joint product planning, product development, sales or other joint marketing activities. Incumbent carriers would not have the opportunity to offer integrated packages of services customers demand, while competing carriers would be free to do so. In any event, the underlying concern here is information about the incumbent's network interfaces and that concern is already addressed through the Commission's network disclosure requirements.

3. There is no reason to prohibit an incumbent carrier from performing operations, installation and maintenance for an affiliated separate subsidiary.

The Commission proposes to bar local telephone company personnel from performing operations, installation or maintenance for the affiliate, even if they do so in compliance with the Commission's existing affiliate transaction rules and accounting safeguards. Currently, the same Bell Atlantic personnel perform these functions, using the same operations support systems, for both local voice and data services. To comply with such a requirement, the Bell Atlantic advanced services affiliate would need to hire and train duplicate personnel, and deploy duplicate systems capable of provisioning services such as DSL. This could increase Bell Atlantic's network operations workforce by 50 percent. *See* Wegleitner Decl. at ¶ 4.

These staggering costs could not realistically be recovered through revenue from advanced services, such as DSL, particularly since other carriers would not be burdened with these costs. Without the ability to obtain operations, installation and maintenance from the incumbent carrier, the advanced services affiliate is not a viable option, particularly for broad scale deployment of advanced services to the mass market.

4. There is no reason to restrict the transfer of customers from an incumbent carrier to an affiliated separate subsidiary or to prohibit joint marketing.

There is no reason for the Commission to restrict incumbent carriers from transferring customer accounts to the advanced services affiliate or to prohibit them from joint marketing. Today, incumbent carriers are able to provide advanced services to customers on an integrated basis with voice and vertical services. For example, when a customer purchases DSL, it can be provisioned over the customer's existing loop, which is also used to provide voice and vertical services. The economy of this type of packaging is particularly important in making advanced services affordable to the mass market. Under the Commission's proposed structural separation, however, advanced services would essentially compete with the incumbent carrier in providing voice and vertical services. This would duplicate customer acquisition costs and cause customer confusion, as requiring duplication of local loop facilities. It makes no business sense to pursue such a strategy when none of these problems exist in the current structure. At the very least, if the advanced services affiliate acquires a customer, the incumbent carrier should be allowed to transfer the customer to the affiliate for any existing services provided by the incumbent carrier without a time limitation.

5. The Commission should continue to allow incumbent carriers to share CPNI with their affiliates.

There is no reason for the Commission to change its CPNI rules. Today, carriers may use, and share with their affiliates, CPNI from local services to market advanced services such as DSL -- they are both in the same local services bucket. To now prohibit the sharing of CPNI with an advanced services affiliate would be yet another reason not to deploy advanced services. Moreover, such an approach is contrary to the competitively neutral approach the Commission has followed thus far -- where all carriers, not just Bell companies or incumbent carriers, must live with the same restrictions.

6. There is no reason to prohibit an incumbent carrier and an affiliated separate subsidiary from using the same brand name and trademarks.

There is no reason to restrict the affiliate's ability to use the incumbent carrier's brand names. Incumbent carriers and their affiliates have been allowed to offer a wide variety of services under a single brand name, just as competitors can do, and this has not created any competitive problems. Moreover, barring affiliates from using an incumbent carrier's brand name would be flatly violative of the First Amendment.

7. There is no reason to prohibit a separate subsidiary from capital, personnel or services from the parent company.

There is no policy reason to preclude an advanced services affiliate's access to its parent's capital. Competing carriers, such as AT&T/TCG and MCI WorldCom/MFS, have unfettered access to the vast capital of their parent corporations. Denying an advanced services affiliate the same opportunity would only make it more expensive for them to compete with these monoliths. In addition, the Commission has never before imposed such a restriction as a condition of structural separation. Even section 272 affiliates, as saddled as they are with restrictions, can still acquire capital from a Bell company parent.

There is likewise no reason why the affiliate should not be able to obtain personnel from its parent or to obtain services from a shared services affiliate. These types of efficiencies are available to section 272 affiliates under the Commission's rules.

III. THERE IS NO NEED FOR THE COMMISSION TO REVISIT COLLOCATION ISSUES.

The Commission should not revise its collocation rules. Under the 1996 Act, states have been given responsibility to determine whether sufficient space is available for physical collocation, and the states alone should develop any new rules that are needed to implement this authority. In addition, the sole lawful basis for mandating collocation under the Act is for interconnection and access to unbundled network elements, which are also matters over which states are granted authority under the Act. And states are currently examining collocation rules and policies, so there is no reason for the Commission to step in.

In particular, the Commission should not require unsecured "cageless" collocation arrangements. The Commission has already decided that physical collocation space should be separated from the incumbent carrier's network for security reasons. There is no reason for the Commission to reverse this decision and expose the public switched network to damage and widespread service interruption. Moreover, Bell Atlantic has offered a secured "cageless" collocation arrangement in New York that is as cost effective and timely as the unsecured arrangements proposed by competing carriers.

In addition, the Commission should continue to allow states to manage the availability of collocation space in individual central offices. The states are in the best position to address these issues because they are closest to them, they have authority under the Act to resolve these issues, and they are already exercising that authority.

A. The Commission Should Not Require Unsecured "Cageless" Collocation Arrangements.

Since the advent of physical collocation, well before the 1996 Act, the Commission has allowed local exchange carriers to take reasonable security measures for to protect the public switched network against service interruption and degradation of service quality. It is for this reason the Commission has never questioned tariff provisions that specify that physically collocated equipment be placed inside a collocation cage in a secured area of the incumbent carrier's premises.

When the Commission implemented the collocation provisions of the 1996 Act, the Commission again recognized the importance of security arrangements. The Commission "continue[d] to permit LECs to require reasonable security arrangements to separate an entrant's collocation space from the incumbent LEC's facilities." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 598 (1996). It found that these measures were needed to "protect both the LEC's and competitor's equipment from interference by unauthorized parties." *Id*.

The Commission's collocation rules therefore provide that "[a]n incumbent LEC is not required to permit collocating telecommunications carriers to place their own connecting transmission facilities within the incumbent LEC's premises outside of the actual physical collocation space." 47 C.F.R. § 51.323(h)(2). They also provide that "[a]n incumbent LEC may require reasonable security arrangements to separate a collocating telecommunications carrier's space from the incumbent LEC's facilities." 47 C.F.R. § 51.323(i). There is no basis for the Commission to reverse its findings or repeal the collocation rules it adopted just two years ago.

The states also have recognized the need for security arrangements with collocation. For example, when recently faced with allegations that security is not a concern in cageless collocation outside secured space, the Massachusetts Department of Public Utilities disagreed. It found that, with increasing local competition,

> [t]he number of CLEC personnel with access to Bell Atlantic's equipment would increase, with increased possibility of human error and damage to Bell Atlantic's central office facilities. <u>We view this escalation as potentially uncontrollable and therefore unacceptable</u>.

Petition of Covad Communications Company, Docket D.T.E. 98-21 slip op. at 11 (Mass. D.P.U. June 5, 1998) (emphasis supplied).

These security concerns are well founded. As Donald E. Albert points out in his attached Declaration,

> [e]ven if CLECs employ well-trained, conscientious technicians, human errors will happen. A commingled cageless environment is a ticking time bomb where a competitor's technician could mistakenly open the wrong equipment cabinet and begin to remove plug-ins, thereby adversely affecting Bell Atlantic's customer service. Or a competitor's technician could mistakenly open a Bell Atlantic cabinet on a type of equipment where the technician needs to be grounded with a grounding strap, and the resulting static discharge would affect Bell Atlantic equipment and service.

Declaration of Donald E. Albert at ¶ 5 ("Albert Decl."). *See* Attachment A at ¶ 5.

Moreover, the purported benefits of unsecured "cageless" collocation – reduced cost, less space and quicker installation – are all illusory. Bell Atlantic proposed initially in New York, and is willing to provide throughout its service area, a secured "cageless" collocation arrangement called Secured Collocation Open Physical Environment ("SCOPE"). With SCOPE, collocators may choose to place their equipment in a secure, environmentallyconditioned area of Bell Atlantic's central office without enclosing that equipment in a cage. In addition, SCOPE reduces the amount of floor space needed for collocation and therefore expands the number of carriers that can obtain physical collocation.

Ironically, any requirement to allow cageless arrangements that give access outside of the separate, secured area would mean that incumbents would be the only carriers that would not be permitted to secure their own equipment to prevent access by non-affiliated carriers. Their competitors, by contrast, could select, a their discretion, secured caged, cageless, or shared arrangements, or may choose to place equipment in their own secure building. Throughout their service area, it is the incumbent local exchange carriers, not the new entrants, that have a carrier of last resort obligation, and the inability to segregate and secure their equipment from authorized access could interfere with their ability to carry out that obligation.

In any event, the Commission does not have authority to require incumbent carriers to give competing carriers access to unsecured portions of the incumbent's premises. Section 251(c)(3) only requires that local exchange carriers provide "access" to network elements on an unbundled basis, and do so "in a manner that allows requesting carriers to combine such elements" themselves. The collocation arrangement described above – together with the other options that Bell Atlantic has made available[19] – does precisely this, and does it in the way

[19] For example, in New York, Bell Atlantic is offering smaller (25 square foot) physical collocation nodes that are suitable for use by competing carriers to combine individual network elements. These smaller nodes will be less expensive than standard (100 square foot) collocation nodes and will enable more competing carriers to establish physical collocation arrangements in New York central offices with limited space.

contemplated by the Act itself. In fact, the collocation provision of the Act requires local exchange carriers to provide for collocation specifically to allow competing carriers to obtain "access to unbundled network elements at the premises of the local exchange carrier." 47 U.S.C. § 251(c)(6) (emphasis added).

Nor, contrary to the claims of some, are local exchange carriers required to give competing carriers free roaming access to their premises, including giving competitors direct access to their frames with screwdrivers in hand. Rather, the Act only imposes a duty to permit collocation of equipment necessary to interconnect or obtain access to unbundled network elements, and, as the Commission's own collocation rules recognize, "[a]n incumbent LEC is not required to permit collocating telecommunications carriers to place their own connecting transmission facilities within the incumbent LEC's premises outside of the actual physical collocation space." 47 C.F.R. § 51.323(h)(2). Giving competing carriers direct access to a local exchange carrier's central office frames to hook up their own wires is way beyond the scope of the Act's requirement simply "to provide for" collocation.

Moreover, any requirement to allow competing carriers to enter an incumbent's premises outside of a collocation arrangement would violate the Fifth Amendment, because the Commission does not have such taking authority. Prior to the 1996 Act, the Commission did not have the statutory authority to require local exchange carriers to permit competing

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In addition, Bell Atlantic is offering virtual collocation nodes in all of its central offices, even though the Act only requires virtual collocation in central offices that lack space for physical collocation. Collocators are already providing DS1, DS3, ISDN, and other advanced services through their virtual collocation arrangements in the same way as they would if they had chosen physical collocation. In fact, virtual collocation has the additional advantage of on-site Bell Atlantic personnel in many offices who can maintain collocators' equipment more quickly than could the collocators themselves.

carriers to occupy their central offices at all, such as through physical collocation arrangements. As the Court of Appeals explained, "[t]he Commission's power to order 'physical connections,' undoubtedly of broad scope, does not supply a clear warrant to grant third parties a license to exclusive physical occupation of a section of the LECs' central offices." *Bell Atlantic v. FCC*, 24 F.3d 1441, 1446 (D.C. Cir. 1994). The 1996 Act cured this problem by imposing on local exchange carriers "[t]he duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier . . . " 47 U.S.C. § 251(c)(6).

Congress did not go further and give the Commission additional authority to require local exchange carriers to permit other kinds of occupations of their central offices. For example, simply attaching connections to the incumbent's frame would be a taking that could only be required pursuant to express statutory authority. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (cable installation on appellant's building constituted a taking under the traditional physical occupation test, since it involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building). Similarly, a transient right given to competing carriers to enter an incumbent's property to make connections would be a taking that requires statutory authority. *See, e.g., Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (a taking occurs where individuals are given a permanent and continuous right to pass to and fro, even though no particular individual is permitted to station himself permanently upon the premise). The Commission lacks the express and unambiguous statutory authority required to order such takings.

B. The Act Authorizes Carriers To Collocate Equipment Solely For Interconnection And Access To Unbundled Elements.

Congress did not establish a collocation requirement that opens the incumbent carriers' central offices to anyone who wants to locate any type of equipment in those offices. Instead, Congress prescribed collocation only for competing carriers and only for "equipment necessary for interconnection or access to unbundled network elements." 47 U.S.C. § 251(c)(6). Consequently, as the Commission itself previously recognized, it does not have authority to extend collocation arrangements to companies that are not carriers or equipment that is not used exclusively for interconnection or access to unbundled network elements. *See Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

In the *Local Competition Order*, the Commission found that "section 251(c) does not require collocation of equipment necessary to provide enhanced services." *Local Competition Order* ¶ 581. Similarly, the Commission declined "to impose a general requirement that switching equipment be collocated since it does not appear that it is used for the actual interconnection or access to unbundled network elements." *Id*.

For the same reason, the Commission should adopt its tentative conclusion and continue its present policy of prohibiting collocation of equipment used for enhanced services. Only telecommunications carriers, not enhanced service providers, are covered by the provisions of the Act governing interconnection and access to unbundled elements. *See, e.g.*, 47 U.S.C. §251(c)(2) (incumbent local exchange carriers have a duty to provide interconnection "for the facilities and equipment of any requesting telecommunications carrier") (emphasis added); § 251(c)(3) (incumbent local exchange carriers have a duty to provide access to network elements "to any requesting telecommunications carrier") (emphasis added). Therefore, enhanced service providers, that have no right of interconnection or access to network elements under Sections 251 and 252, have no statutory right to collocate equipment in incumbent exchange carriers' central offices.

Even if the Commission had the authority to expand the permissible uses of collocation – which it does not – it should not attempt to do so. Expanding the type of equipment that may be collocated would quickly deplete the available space in many offices and deprive potential competitors of the ability to collocate their legitimate network equipment. And existing rules allowing enhanced service providers to connect have proven adequate.

C. Incumbent carriers should be able to require that collocated equipment meet industry standards on a non-discriminatory basis (e.g., NEBS safety standards and performance standards that limit service interference).

The Commission should allow incumbent carriers to impose equipment safety standards on a non-discriminatory basis. For example, collocated equipment should comply with the Network Equipment and Building Specifications ("NEBS") requirements that relate to safety risks or network hazards.[20] Safety standards are needed to protect the integrity of the central office and personnel working in that office, as well as Bell Atlantic's equipment and telecommunications network.[21] *See* Albert Decl. at ¶ 4.

For example, one carrier collocated (but had not activated) equipment before it had been NEBS tested, claiming that it met the NEBS standards. However, during the NEBS

[20] These hazards include, but are not limited, to heat, fire, electrical, size and weight, inability to withstand earthquakes, excessive electromagnetic emissions, and noise emissions.

[21] If an incumbent currently uses equipment that does not comply with NEBS safety provisions, collocators should be able to install the same type of equipment. *See Notice* at ¶ 134. This will generally consist of equipment that pre-dated a current NEBS standard. Bell

testing of that equipment, it failed fire-retardant tests and needed to be substantially redesigned before it could be used. *See id*. at ¶ 7. In another instance, a collocator installed equipment without authorization before it had been NEBS tested and refused to disconnect it when challenged. When the equipment was finally tested, it failed to meet NEBS emissions standards and the collocator was required to take the equipment out of service and replace it to avoid potential network harm. *See id*. at ¶ 8. In both instances, the failure of the equipment to meet NEBS safety and hazard specifications could have impaired service to customers and, in one case, could have harmed Bell Atlantic's personnel.

Although the performance of another carrier's network should remain the responsibility of that carrier, collocated equipment should also comply with performance standards that prevent interference to other services. *See* Notice at ¶ 135. Absent such a requirement, all customers could be exposed to service interruptions caused by interference from collocated equipment.

The Commission should not, however, adopt its tentative conclusion that incumbent exchange carriers must provide a list to each requesting carrier of all approved equipment and all equipment they use. *See id*. at ¶ 147. Creating and updating such a list would be nearly impossible. Many items of "approved" equipment are available with a large number of varying and constantly-changing capabilities and options, and each of those many varying capabilities would need to be identified as either "approved" or "not approved."

Atlantic provides on request a list of the equipment that is widely used in its central offices to assist collocators when selecting their own equipment.

D. The States Have Jurisdiction Over The Availability Of Collocation Space And Are Exercising That Authority.

The Act gives state commissions exclusive authority to administer the availability of physical collocation space by providing that a local exchange carrier may offer virtual collocation in lieu of physical if it "demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations." 47 U.S.C. § 251(c)(6) (emphasis added). This delegation of authority makes sense because the states are closest to and in the best position to resolve these local issues.

In exercising their authority, a large number of states, including those in Bell Atlantic's service area, have reviewed showings that specific offices cannot support physical collocation or are conducting proceedings to derive standards for such determinations, examining the same issues that the Commission seeks to address here. For example, in Case 98-C-0690, the New York Public Service Commission is reviewing proposals to reduce the size of cages for physical collocation, allow sharing of cages, modify rules for virtual collocation, and to allow some form of "cageless" collocation. Similarly, the Massachusetts Department of Public Utilities recently arbitrated "cageless" collocation proposals, examining cost, delay, security, and other factors. Settlements reached in arbitrations in Virginia, Pennsylvania, New Hampshire, New Jersey, Maryland, and the District of Columbia all involve interconnection agreements with a competing carrier and address cageless collocation, minimum cage size, sharing of cages, and other matters addressed in this Notice. Maine is reviewing similar issues in response to an arbitration petition by another carrier.

States, therefore, are already exercising their statutory authority over collocation. Separate consideration here of the same issues would not only be redundant but could result in "national standards" that are inconsistent with the findings of individual states and with provisions of interconnection agreements. Such inconsistent standards could impede, rather than facilitate, competition.

The Commission should not interfere with these state efforts by requiring incumbent local exchange carriers to permit "any competing provider that is seeking physical collocation at the LEC's premises to tour the premises." Notice at ¶ 146. Such a requirement is unwise for several reasons.

First, as discussed above, Congress gave state commissions the exclusive right to resolve disputes regarding space availability. 47 U.S.C. § 251(c)(6). It should be up to each state, not the Commission, to decide how best to gather information that will enable it to exercise that authority.

Second, allowing each potential collocator to tour each central office would put the incumbent exchange carrier into the role of a tour operator, fielding constant and repeated requests by a multitude of companies to tour its offices. Many carriers will likely want to tour central offices to obtain competitive information about their competitors and determine whether they are warehousing collocation space. This constant tourist traffic is certain to disrupt the normal office operations and impose unnecessary administrative costs that would be passed through to the collocators. It will also spawn endless complaints, as each competitor develops its own floor plan to remodel the incumbent's central office by eliminating or relocating needed office space, employee lounges, bathrooms, and other facilities. Rather than facilitating state decisions, such a rule could bog the process down into numerous competing space proposals.

Even if the Commission had authority to regulate the details of how each central office is being used, which under the Act it does not, it should not attempt to micromanage what equipment an incumbent carrier places in its own central office, what staff offices are appropriate to remain in central office space, or the amount of space that should be held for future use, including space needed to meet an incumbent's carrier of last resort obligations. *See* Notice at ¶ 142.

For example, the Commission should not attempt to define what constitutes "obsolete" equipment and require incumbent carriers to remove it from their central offices. Some "obsolete" equipment may still be used to provide service to customers, and replacement equipment may not be available to continue service. Similarly, the incumbent may need to place equipment in a central office prior to activation to allow for testing and changeover without service interruption, or allow it to remain in place temporarily pending disposal to avoid unnecessary warehousing expense.

Finally, the Commission should not require even more detailed reports about each collocation office than are now provided, as it proposes. *See id*. at ¶ 147. Bell Atlantic currently provides reports on an Internet Website of all offices in New York in which collocation has been requested, including the available types of collocation and those types that are currently in place. A carrier that wishes more information about a particular office may contact Bell Atlantic. Bell Atlantic is already working to provide these reports for other jurisdictions.

E. It Would Be Unreasonable To Require Standard Rates For Collocation But Still Allow Collocators To Demand Custom-Designed Arrangements.

Since nearly all competing carriers request custom-designed physical collocation arrangements, the Commission should not attempt to specify nationwide standard space preparation intervals or standard charges for space preparation. *See id.* at ¶ 144. A number of factors may affect those intervals, including the amount of work the collocator requests and subsequent changes to the initial order, the number of offices being prepared at the time in the immediate area, the availability of contractors, the pre-existing condition of the central office space, zoning requirements, equipment availability and other local factors. Similarly, charges for this work may vary widely, as a result of variation in local wage rates, cost of living, filing fees, and other local factors outside of the incumbent's control. So long as the Commission allows collocators to demand custom-designed arrangements, it should not attempt to adopt a nationwide "cookie-cutter" approach to either charges or space-preparation time. Instead, it should leave these matters to state commissions which are closer to these local issues.

IV. THERE IS NO REASON FOR THE COMMISSION TO ADOPT NEW LOOP UNBUNDLING RULES

A. The Commission's Existing Unbundling Rules Are Adequate.

The Notice asks whether the Commission's unbundling rules should be revised in light of the availability of advanced service offerings. The simple answer is no. The Commission's unbundling rules are adequate for competing carriers that want to offer advanced services.

The Commission's rules require incumbent carriers to unbundle loops, which they define as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and an end user customer premises." 47 C.F.R. § 51.319(a). This definition is already broad enough to include "two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide services such as ISDN, ADSL, HSDL, and DS-1 level signals." *Local Competition Order*, ¶ 380.

Each of these loop types is separately addressed in Bell Atlantic's standard interconnection agreements. It is Bell Atlantic's understanding that a number of competing local exchange carriers have already purchased unbundled loops in order to provide xDSL-type services. To date, these loops have not been specifically pre-tested for DSL-compatibility; but pursuant to the terms of its interconnection agreements, Bell Atlantic is in the process of making pre-tested DSL compatible loops available to its competitors and its own retail operations on a nondiscriminatory basis. Moreover, Bell Atlantic's retail sales channels and Bell Atlantic's competitors will have nondiscriminatory access through a web-GUI interface to the database that results from this pre-testing process for pre-ordering and ordering purposes. Again, the Commission's existing rules are entirely adequate to ensure this result. *See, e.g.*, 47 C.F.R. § 51.319(f)(1).

B. The Commission Cannot Require Incumbent Carriers To Provide Network Elements That Are Superior In Quality To Those That Exist In Their Networks.

In its Notice, the Commission makes tentative conclusions that could be interpreted as requiring incumbent carriers (1) to provide unbundled loops free of loading coils, bridged taps, and other electronic impedances and (2) to collect and make available detailed information about their loops -- even where they do not do so for themselves. Advanced

Service Notice at ¶¶ 151, 157.[22] Neither of these interpretations would be consistent with the Act.

The Commission already has found that conditioning local loops to enable competitors to offer advanced digital services constitutes the provision of "higher-quality" access to network elements than provision of non-conditioned loops. *Local Competition Order* at ¶ 314 and n.680. The 1996 Act, however, gives incumbent local exchange carriers the duty to provide "nondiscriminatory access to network elements on an unbundled basis." 47 U.S.C. § 251(c)(3). The Eighth Circuit has definitively found that this provision

> does not mandate that requesting carriers receive superior quality access to network elements upon demand.... The fact that interconnection and unbundled access must be provided on rates, terms, and conditions that are nondiscriminatory merely prevents an incumbent LEC from arbitrarily treating some of its competing carriers differently than others; <u>it does not mandate that incumbent LECs cater to every desire of every requesting carrier</u>.

Iowa Util. Bd v. FCC, 120 F.3d 753, 812-13 (8th Cir. 1997) (emphasis added); *cert. granted*, 118 S. Ct. 879 (1998).

But that is precisely what the Commission's proposal could be interpreted to require. Where Bell Atlantic does not condition loops or collect detailed loop information – either for its own advanced services or for competitors – it does not violate any conceivable interpretation of the section 251 non-discrimination standard. No competitor would be

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[22] Although the Commission suggests that information on individual loops will enable competing carriers to determine if a loop is capable of supporting advanced services, Notice at ¶ 157, there are other factors not reflected in readily-available information, such as presence of certain electronics and potential interference with other services in the same binder group, that affect a loop's suitability for a particular advanced service.

favored or disadvantaged, and Bell Atlantic's operations would obtain no benefit compared to new entrants.

Requiring incumbent local exchange carriers to provide superior access for loops, and essentially become a construction company for competitors, also would be contrary to sound public policy. The section 251 unbundling provisions were designed to allow competitors to fill in piece parts of their local networks so that they may enter the market while they are building their own facilities. *Id*. at 816. Where they want to provide services that they cannot technically offer over the incumbents' facilities, the new entrants will have an incentive to deploy their own advanced facilities in order to obtain a competitive advantage over the incumbent. By contrast, conscripting the incumbent into forced labor to modify its own network at the behest of any competitor would undermine these incentives and ultimately deter, rather than promote, facilities-based competition for advanced services.

Turning every incumbent local exchange carrier into a construction company for its competitors also would undermine the incumbent's ability to operate efficiently. Not only would it have to maintain a workforce sufficient to meet its own needs, its carrier of last resort obligations, and the obligations imposed by the 1996 Act, but it also would need to retain and devote substantial additional resources in order to meet an uncertain number of varying demands from its competitors, with no assurance that the costs of these additional resources could ever be recovered fully. Ultimately, this will harm consumers, because they will need to foot the bill for these unnecessary costs, and because their service could be impacted if resources are diverted from maintenance of their services.

There also are technical problems with the Commission's proposal. Conditioning a loop for one advanced service does not necessarily mean that the loop will support other advanced services. If electronics are added to a loop to enable it to support ISDN, for example, the presence of those electronics could disqualify that loop for ADSL. Therefore, an incumbent could not meet a general request to condition loops to support a variety of advanced services, as the Commission appears to require, and it may be technically feasible to condition a loop for one advanced service but not for another. Notice at ¶ 53. Moreover, introducing a new advanced service into an existing binder group could interfere with advanced services already being providing through other pairs in that binder group, or even in an adjacent group. This is because, at the frequencies at which these services operate, one service may cause induction interference to another service in pairs that are in close proximity. As a result, in order to maintain service to existing customers, it would be necessary to divert any interfering advanced services onto pairs in a different binder group.

C. The Commission Should Continue To Allow Incumbent Carriers To Manage Loop Spectrum In Accordance With Their Nondiscrimination Obligations.

The Commission should not attempt to regulate loop spectrum. The technology for advanced services is, by definition, new and evolving. Any attempt by the Commission to set spectrum management rules would impede the development and deployment of these new technologies. The Commission should instead require local exchange carriers to manage loop spectrum in accordance with their non-discrimination obligations, at least until national standards for spectrum management are developed.

The Commission should facilitate the management of loop spectrum by requiring all carriers to disclose to the incumbent the performance and spectrum utilization of the technologies they use to provide advanced services over the incumbent carrier's loops. As Bell Atlantic's Vice President for New Service Technology demonstrates in his attached declaration, technologies such as xDSL that operate at high power levels interfere with other services provided over loops in the same binder group and even, in some cases, adjacent binder groups. *See* Declaration of Mark A. Wegleitner at ¶ 6. To protect against this interference, the incumbent carrier must know the characteristics of the technology a carrier wishes to deploy and the specific type of loops over which they intend to use the technology. *See id*. Mr. Wegleitner explains that the alternative -- having the incumbent investigate and remedy interference once it is discovered -- is unworkable. If interference is detected in a binder group, or in an adjacent binder group, each loop in the binder group must be shut down to isolate the problem, and this would impair customer service The other option is to test each pair in the binder group manually. Both solutions are time consuming, inexact and expensive. *See id*. at ¶ 7.

D. The Commission Should Reaffirm That A Carrier Purchasing A Local Loop As An Unbundled Network Element Obtains The Exclusive Right To Use That Loop.

There is no reason to consider a requirement that would allow multiple carriers to purchase spectrum capacity on a single unbundled loop. The Commission has already determined that a carrier purchasing an unbundled element is purchasing the right to exclusive access or use of the entire element. It is not purchasing an access service, such as spectrum capacity on a single loop.

In the *Local Competition Order,* the Commission found that "[w]hen interexchange carriers purchase unbundled elements from incumbents, they are not purchasing exchange access 'services'. They are purchasing a different product, and that product is the right to exclusive access or use of an entire element." *Local Competition Order* at ¶ 358. A carrier purchasing a local loop as an unbundled network element "will have to provide whatever services are requested by the customers to whom those loops are dedicated . . . both local and long distance services." *Id*. at ¶ 357. Accordingly, "interexchange carriers purchasing unbundled loops will most often not be able to provide solely interexchange services over those loops." *Id.*

The same reasoning applies to advanced services. If a common carrier purchases a loop as an unbundled network element, under this reasoning it will have to provide whatever services are requested by the customer served by that loop, including advanced and voice services. The Commission's order would prohibit carriers purchasing unbundled loops from providing solely advanced services over those loops.

E. There Is No Need To Establish Standards Here For The Attachment Of Electronic Equipment At The Central Office End Of A Loop.

It is entirely premature and unnecessary for the Commission to consider setting standards for the attachment of equipment at the central office end of a loop. The technology for advanced services, such as xDSL, is still in its infancy and developing very rapidly. Any attempt by the Commission to set standards would impede the development and deployment of new innovative technologies. Instead, it should leave standards-setting to the normal standards process, once the technology is sufficiently settled to permit national standards.

Moreover, carriers are already attaching equipment at the central office end of loops to offer advanced services. Bell Atlantic is unaware of any problems resulting from the absence of Commission-imposed equipment standards. As new, innovative equipment is developed, that equipment is being tested with the current network to ensure its performance. Commission-prescribed standards could constrain that process and retard innovation. The Commission should therefore continue to allow industry standards bodies to set technical standards for the equipment used to provide advanced services.

In addition, the Commission should not apply Part 68 rules to central office equipment, as it suggests. Part 68 rules are limited in scope to ensure that connection of customer premises equipment will not harm the telephone network. Connection of equipment in the central office is far more complex and requires very different standards. Rather than attempting to develop a new set of rules, however, the Commission should endorse use of industry-wide central office standards while giving each carrier the flexibility to determine appropriate requirements to meet the needs of a particular office. So long as those requirements are applied on a non-discriminatory basis, competition will not be impacted.

F. There Is No Reason For The Commission To Require Subloop Unbundling Of Loops With Digital Loop Carriers or Remote Terminals.

There is no reason for the Commission to require subloop unbundling of loops that are configured with digital loop carriers or remote terminals. The Commission has already found that it is inappropriate to require subloop unbundling and nothing has changed that would justify a reversal of that finding.

In the *Local Competition Order*, the Commission found that proponents of subloop unbundling had failed to address technical issues regarding network reliability, service quality and the risk of service disruption. The Commission therefore concluded that “the technical feasibility of subloop unbundling is best addressed at the state level on a case-by-case basis.” *Local Competition Order*, ¶ 391.

The situation is no different today for loops served by remote terminals. Providing access to loop concentration points by competitors would increase the risk of error by a competitor's technicians that may disrupt service to customers of one or both carriers. There is still no technology that would eliminate or substantially reduce this risk. Moreover, the lack of technical standards for sub-loop elements and the absence of overall responsibility for loop performance is very likely to degrade overall service quality.

The Commission should continue to allow states to address subloop unbundling issues on a case-by-case basis. They are closer to the local issues and are better equipped to address the numerous technical and operational issues associated with subloop unbundling.

V. THE COMMISSION SHOULD UPHOLD ITS PRIOR DETERMINATION THAT ACCESS SERVICES ARE NOT RETAIL SERVICES SUBJECT TO THE WHOLESALE DISCOUNT PROVISIONS OF SECTION 251(C)(4).

A. The Commission Has Already Determined That Access Services Are Not Retail Services And Are Not Subject To Wholesale Pricing Requirements.

In the *Local Competition Order*, the Commission correctly concluded that exchange access services should not be subject to the wholesale discount requirements of Section 251(c)(4). The Commission now proposes to impose wholesale discount requirements on advanced services offered as exchange access services under access tariffs. There is no reason for the Commission to reverse its prior decision.

The Commission earlier found "several compelling reasons to conclude that exchange access services should not be subject to resale requirements." Exchange access services are "fundamentally non-retail services" and the fact that they are offered pursuant to tariffs that do not restrict their availability "does not alter the essential nature of these services." *Local Competition Order*, ¶ 874. Moreover, "because access services are designed for, and sold . .

. as an input component to . . . retail services, LECs would not avoid any 'retail' costs when offering these services at 'wholesale.'" *Id.*, ¶ 874. As the Commission explained, "Congress clearly intended section 251(c)(4) to apply to services targeted to end user subscribers, because only those services would involve an appreciable level of avoided costs that could be used to generate a wholesale rate." *Id.*

These compelling reasons apply with equal force to advanced services offered as exchange access services. These are "fundamentally non-retail services" because they are designed for and sold as input components to retail Internet services. For example, Bell Atlantic's exchange access DSL service cannot, by itself, be used by an end user to gain access to the Internet. Instead, competing carriers and Internet Service Providers will need to package these DSL exchange access services with other Internet services, such as e-mail and an "on-ramp" to the Internet, and offer these packages as retail services to end users.

The fact that some large end users might purchase these xDSL exchange access services directly from an access tariff and create their own Internet service package is no different from what they can do today when they purchase exchange access service to create their own long distance service. In either case, the direct purchase of exchange access services by large end users does not change the fundamentally non-retail character of exchange access services.

Moreover, the costs of providing DSL exchange access services to Internet Service Providers and to competing carriers are essentially the same. There are no retail costs associated with providing these services to Internet Service Providers that Bell Atlantic would avoid when providing them to competing carriers. They are therefore not the types of retail services that Congress required be made available at an "avoided cost" wholesale discount.

B. Imposing Wholesale Pricing Requirements On DSL Services Provided As Exchange Access Services Under Access Tariffs Will Create An Incentive For Internet Service Providers To Game The Regulatory System To Qualify For Wholesale Discounts.

Bell Atlantic expects that carriers and Internet Service Providers will purchase DSL services from Bell Atlantic's access tariffs for the same purpose – to package these access services with other Internet services and offer them to end users in competition with one another. But if the Commission were to impose wholesale pricing requirements on DSL services at levels similar to those provided for other services when they are provided as exchange access services under access tariffs, it would create a significant difference between the price that competing carriers and Internet Service Providers pay for these services. This price disparity will create a strong incentive for Internet Service Providers to game the regulatory process and become "carriers" just to obtain the wholesale discount, even though those discounts would not cover "avoided costs," which simply do not exist for DSL services.

Internet service providers have already begun setting up shop as "carriers" for the sole purpose of getting paid reciprocal compensation for the Internet traffic that is delivered to them. One example is illustrative: During the first quarter of this year alone, just one of these "carriers" that provides no dial tone to anyone, sends essentially no traffic to Bell Atlantic, and whose customer service representative says is not offering local telephone service, collected several million dollars in reciprocal compensation – all to provide the same Internet service it provided before it re-labeled itself a "carrier." The lure of wholesale discounts would undoubtedly drive even more Internet Service Providers to pretend they are "carriers."

In any event, it simply isn't possible to maintain a significant price difference for the access services that carriers and Internet Service Providers use to provide Internet service packages to end users in competition with one another. Internet Service Providers will either figure out a way to obtain the wholesale discount by masquerading as "carriers" or stop purchasing these access services.

Respectfully submitted,

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